ALBERTA PROPERTY RIGHTS ADVOCATE OFFICE

2013 Annual Report

Provincial Building, Main Floor, South East
200 5 Avenue South
Suite 1:05
Lethbridge, Alberta T1J 4L1 Canada
Tel 403-388-1781 Fax 403-388-1788
Email: propertyrights@gov.ab.ca

Table of Contents

MESSAGE FROM THE PROPERTY RIGHTS ADVOCATE

02 June 2014

In 2013, the Property Rights Advocate Office completed its first full calendar year of service to Albertans. Throughout the year, our underlying duty has been to work towards the preservation and support of private property rights in our province.

That duty - the support of private property rights - is not a partisan issue. It is not an ideological question, nor one of class and demographics. Rather, a system of stable, strong, predictable property rights will benefit all Albertans, for that stability is one of the mechanisms by which we both establish and measure the freedom and prosperity that should be available to every person.

In meeting with many people and associations throughout the past year, in listening to their concerns and in articulating many of those concerns in this Annual Report, I have endeavoured to demonstrate the following operational values:

- **Honesty** – to keep an open mind and communicate the truth with clarity
- **Consistency** – that our reasoning be based on principles of law and ethics, not expediency or circumstance
- **Diligence** – to complete our work in an objective, even handed, non-partisan manner, basing conclusions on a thorough examination of relevant facts

With these values, we are working to encourage a culture of respect for, and sensitivity to, property rights in Alberta. By being consistent in them, we will maintain the Property Rights Advocate Office as a trusted, impartial resource on property rights issues.

I continue to recognize the trust that is placed in this Office, and the duty that is owed to all Albertans. I remain committed to fulfilling that duty by serving Albertans with dignity, honour and character.

N. Lee Cutforth, Q.C.
Alberta Property Rights Advocate
Lethbridge, Alberta

INTRODUCTION

Foundational Principles of Property Rights

As was mentioned in the 2012 Annual Report of the Property Rights Advocate Office, one of the challenges in dealing with property rights is in having a common understanding of what is meant by the term "property rights". While a great volume of academic and popular writing addresses that question, I came to believe that a common-ground understanding of property rights can be distilled down to these basic elements:

- right of possession
- right of use
- right of disposition

The extent to which a property owner can operate in all of these elements represents the degree of freedom enjoyed by that owner in relation to his or her property. The degree to which that ability is compromised or restricted represents a corrosion of those rights.

The freedom of individuals to possess, use and dispose of private property is not a mere privilege, to be granted by the whim and favor of passing government policy. Rather, property rights are recognized in Alberta jurisprudence as a deep-rooted, foundational component of a free and prosperous society.

That is not to say that the elements of property rights exist in absolute, unassailable terms. However, any qualifications to private property rights are to be exceptions to the property rights rule. A demonstrable need to encroach on private property does not diminish the fundamental importance of property rights in Alberta, nor the need to strictly interpret such exceptions.

The Fraser Principles

Chief Justice C. A. Fraser, of the Alberta Court of Appeal, has articulated a number of foundational principles relating to property rights in Alberta. In a 2002 decision, *Love v. Flagstaff (County of) Subdivision and Development Appeal Board,* found under the court citation 2002 ABCA 292, she addresses the very essence of property rights in Alberta, and the nature of permitted limits on their enjoyment.

Those principles may be summarized as follows:

- private ownership of land remains one of the fundamental elements of our Parliamentary democracy
- respect for individual property rights is a principle firmly entrenched in the legislative planning scheme in effect in Alberta
- predictability in land use is important- the public must have confidence that rules will be applied fairly and equally
- the law must be applied consistently
- expropriation of private property is permitted for the public (not private) good in clearly defined and limited circumstances
- encroachment on individual rights, especially by private parties, should be strictly construed

These principles require that any encroachment on private property rights must be strictly interpreted, if those rights are to have any meaningful significance.

The Miller Doctrine

While the cause of property rights does not enjoy specifically enumerated protection in the *Canadian Charter of Rights and Freedoms (*the *Charter)*, there is a compelling argument for a constitutional framework for protecting property rights in Canada.

Alberta Court of Queen's Bench Justice D.K. Miller, in his *obiter dicta* comments within a 2011 decision, presents the proposition that private property rights are not dependent on a dedicated *Charter* provision for arguing their existence and validity. In *Van Giessen, et al. v. Montana Alberta Tie Ltd. and the Surface Rights Board (Attorney General of Alberta as Intervenor)*, found under the court citation 2011 ABQB 219, Justice Miller observed a rich tradition of property rights in Anglo-Canadian jurisprudence, and that Canadian law recognized, as a fundamental freedom, the right of the individual to enjoy property, and to not be deprived of that right except by due process of law.

He then presented the proposition that section 26 of the *Charter* which reads:

> *The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.*

then provides the mechanism to recognize and protect property rights which pre-existed the *Charter*, and were based in the Common Law.

> *"Until the lacuna of property rights in the Charter is corrected, vulnerable landowners will need to build on the rich history of common law property rights that appear to be guaranteed by s. 26 of the Charter."*

Property Rights are Human Rights

The diligent protection of private property rights is not about setting off one interest group against another, or against society as a whole. Rather, it is matter of making society as a whole stronger through the acknowledgement and protection of property rights for all Albertans.

That acknowledgement and protection will have honest effect when we ensure that any encroachments on an individual's property are for a limited purpose, in pursuit of a legitimate public interest, and are made according to the due process of law. For the Property Rights Advocate Office, it continues to be truism that private property rights are both a measurement of, and a means toward, a free and prosperous society. A system of reliable, predictable private property rights supports economic security and stability, which in turn are essential tools for each Albertan to have the opportunity to live out the Provincial motto: *Fortis et Liber* – Strong and Free.

Operational Values of the Property Rights Advocate Office

Three Tools

The underlying duty of the Property Rights Advocate Office is found in the preservation and support of private property rights in Alberta. Under the existing statutory framework, the Legislature has given this Office three tools by which we can offer that support.

The first tool is to act as an impartial information resource to the public, regarding the right to compensation in situations of expropriation or compensable takings. Included in this resource role is the provision of information on proposed legislation and its likely effect on property owners.

The second tool is the responsibility to receive complaints from land owners who may be facing expropriation or compensable taking, and who believe that the taking authority is acting inconsistently with the applicable legislation. We then would review the complaint and prepare

a written report of our conclusions. That report will be filed with the Court or administrative board that is determining compensation, and must be taken into account by the Court or board when deciding the costs payable by the expropriating authority.

Third is our Annual Report, which must be prepared and filed with the Speaker of the Legislative Assembly, and made available to the public, after the end of each calendar year. The Annual Report is the tool by which the Property Rights Advocate can make any recommendations relating to property rights that the Advocate deems appropriate. I believe that this tool may prove to be the most relevant of the existing inventory, as it allows the Property Rights Advocate Office to serve as a public voice for land owner concerns, and to provide a mechanism for land owner-initiated reforms to be introduced.

Operational Values

Beyond the mechanics of the tools provided, an important aspect of the duty of this Office is the attitude we demonstrate in the execution of our duties. To effectively serve in the role we have been given, we must be consistent in our approach. So, for any issue or complaint that comes under our review, we always must ask the following questions:

- Is a given encroachment on private property rights necessary, either for a legitimate public good, or to balance the fair use of property rights by another owner?
- What outcome will best support the fullest possible enjoyment of private property rights as an essential element for a free and prosperous society?
- What outcome will best respect the cultural and philosophical values that give significance to land ownership in Alberta?

Asking these questions, and producing a credible body of work, requires an underlying concern for the integrity of this Office, and a consistent demonstration of the following values in our labours and communication:

honesty – keep an open mind and communicate the truth with clarity
consistency – reasoning must be based on principles of law and ethics, not expediency or circumstance
diligence – our work will be completed in an objective, even-handed, non-partisan manner, and conclusions will be based on a thorough examination of relevant facts

When I was appointed to this position, I stated that establishing the integrity of the Property Rights Advocate Office would be a foundational priority. Only upon that foundation can we

develop the trust that Albertans have a right to place in their public institutions. By working consistently in these values, we will accomplish that goal.

ACTIVITIES

Endeavours

The number of calls for information or assistance to the Office has been modest, but steady. In 2013, we received a total of 223 service requests, most being directly from land owners, but some referred through constituency offices of various Members of the Legislative Assembly (MLA).

The telephone inquiries that we have been able to identify are divided almost equally between the "780" and "403" area codes, indicating an awareness of our Office that is equally distributed across the Province.

We cannot claim that everyone who has called in is happy with the information we provide. Sometimes, they would like to see the law changed, and sometimes, their inquiry relates to a matter outside of our jurisdiction (for example, a civil dispute between private parties). But, even in such cases, we do try to provide relevant information, and point land owners in the right direction. It can be said that most people are appreciative of the availability of the information service. Below is a sample of comments provided by some of the land owners who have contacted us for information:

> *"Thanks so much for your help in pointing me in the right direction."*
>
> *"This has been very helpful....I'm glad I called."*
>
> *"On behalf of all land owners in Alberta, let me applaud the mandate of your office. I gratefully appreciate all your efforts."*
>
> *"Thank you for the information you have been able to provide. It was very useful and appreciated."*
>
> *"Thank you very much for everything as this will really help us out. A lot of what you have told us we did not really know."*

Similarly, requests for speaking engagements have been moderate, but reflect a steady interest in this office. The Office was able to accept 28 requests to speak before various groups, not just land owner groups, but also, industry and professional associations, as well as some government departments and agencies.

In addition to formal presentations, we have been engaged in ongoing outreach activities with elected leaders and various decision makers within the public service. For example, I attended a regional consultation meeting on the South Saskatchewan Regional Plan, to provide input from a property rights perspective. On another occasion, I was able to contribute my perspective to the Alberta Utilities Commission in its review of the notice provisions in their process rules.

With regards to Members of the Legislative Assembly, I have sent regular communications to all of the political parties represented in the Legislature, to confirm my availability to discuss property rights issues, and to continue to present this Office as a non-partisan resource. In 2013, I was able to have informal discussions with a number of MLAs, from three of the four parties represented in the Legislative Assembly. The MLAs and their constituency offices are an important channel for referring relevant constituent concerns to our attention. For this reason, we hope to continue building those relationships, for the benefit of all Albertans.

Although many service requests were received by the Office, there were no formal complaints filed under section 4 of the *Property Rights Advocate Act.*

I appreciate the interest that has been shown in this Office, from individual inquiries, from a number of MLAs and from speaking invitations extended by a variety of interested groups. I will continue to speak regularly to land owners and other property rights stakeholders throughout the Province. In planning these speaking opportunities, I do rely upon the interest and hospitality of Albertans, and welcome invitations from across the Province. While it may not be possible to attend every event, I remain committed to keeping myself as accessible as possible.

This Office began with a staff of two - myself and one administrative support person. In 2014, the Office will bring in a Director and a Public Engagement Officer. These positions will increase our capacity to engage in policy research on land owner issues, and enable us to be more proactive in distributing information to Albertans.

As the Property Rights Advocate Office moves into its second full year of service, we will continue to encourage a culture of respect for and sensitivity to, property rights in Alberta. We will do so from the perspective of a non-partisan, impartial resource on property rights issues, committed to providing objective information, as well as acting as a public voice for property rights concerns.

Observations

The range of concerns that I have heard in the past year is as wide and diverse as the people who have shared them with me. A comprehensive catalogue and discussion of each of those concerns and complaints would be voluminous, perhaps at the price of clarity. However, I hope that the synopsis of concerns and issues offered in this Report will provide an accurate sense of

the major issues faced by land owners, as raised with me in discussions with various stakeholders. Some of the concerns are discussed in the *Recommendations* section of this Report, along with specific proposals for reform. Others are noted in this section, as general matters of recurring and ongoing interest to land owners.

Abandoned Well Sites and Pipe Lines

There is a growing appreciation of the long-term effects of natural resource extraction and conveyance facilities upon the land on which they are located. This understanding exists in direct correlation to the growing inventory of abandoned or dormant facilities in Alberta. Whether the long-term problems relate to residual environmental effects, or the limitations on future land use and development, the impression is left with many affected surface rights land owners that such consequences, often permanent in nature, are not adequately addressed in the existing compensation structure.

While these concerns exist across the Province, they are especially acute in urban settings, where the density of population and development serve to magnify the consequences of natural resource extraction.

For example, last year, we received a call from a distressed urban home owner, who reported that the gas company had just come to her door to tell her that there was an old, abandoned gas well located under her basement. Aside from the natural safety concerns this presents to the home residents, the situation also raises a number of legal and financial ramifications. For example, current setback requirements for development near abandoned wells would severely restrict – perhaps eliminate- the redevelopment potential of that land if the existing structure was destroyed. The fair market value of the property, even its very marketability, could be affected as a result.

Another problem relates to the lack of an effective, timely remedy for land owners if a resource company fails to act diligently in its contractual and statutory obligations, including with respect to the reclamation process. And, if the operator transfers the facility to a shell company which lacks proper finances, the land owner then bears the risks of operator inaction on reclamation. Defining future access to abandoned sites, so as to not unduly interfere with land use operations, also has been identified as a long-term consequence to land owners.

In the coming year, this Office will begin a research project, to identify and articulate specific ways to reduce the vulnerability of land owners in relation to abandoned or decommissioned resource infrastructure, and to have the compensation structure better reflect the associated long-term risks.

Municipal Government

Inquiries or complaints related to certain actions of municipal governments continue to comprise a notable portion of the calls to this Office. Although most such calls were not within statutory mandate of the Property Rights Advocate Office, they do raise a number of land owner concerns, including:

- the lack of an effective process, short of litigation, that would resolve disputes with municipal government that relate to fair process by the municipality (for example, if a land owner claims that a bylaw is not being applied fairly or consistently);
- the lack of a right to compensation in certain instances where the regulatory actions of a municipal government could have a detrimental impact on the value or marketability of an individual's property (for example, by municipal imposition of land use or environmental reserve requirements).

The former issue could be addressed by an expansion of the role of the Municipal Government Board, and the latter by a significant revision to section 621 of the *Municipal Government Act*. Perhaps these avenues will be explored and developed as possible solutions within the context of the ongoing broad Government review of the *Municipal Government Act*. That review process, and its results, will be of continuing interest to this Office, as we monitor the extent to which these land owner concerns have been addressed.

Adverse Effect on Adjacent Land Owners

We received a number of calls from land owners who felt that their agriculture operations had been adversely affected by nearby power line construction. However, because the right of way was not located on their land, they were not able to advance a claim for compensation without either the goodwill of the company or the expense of protracted litigation. One farmer in particular reported that his intensive farming operation was suffering because the close proximity of power lines on a neighbour's land reduced the area on his own land that essential aerial sprayers were willing to cover.

Cases such as this demonstrate the room for an expanded administrative mechanism in the surface rights regime that allows a claim for compensation by a land owner who, although not within a power line right of way, still may be affected by the presence of a utility or energy project. Fair standards of access to justice in these circumstances should not require the burden of litigation if the goodwill of a developer fails.

Fair Process

Many of the inquiries or complaints we have received could be grouped under the umbrella of fair process, and this, in turn, is made up of three basic elements. The first element is the concept of limited purpose - is the proposed encroachment on a property right required for a legitimate public good? Is it truly necessary? Is it minimally intrusive to the land owner's interest? By itself, ensuring reasonable compensation in the taking of a private property interest is not sufficient to establish fairness in the taking process. Fairness also requires establishing the legitimacy of the taking in the first place – demonstrating that the public good in a proposed project is real and of sufficient necessity to warrant the taking of a person's right to freely use his or her possessions.

Looking to the principles articulated by Chief Justice Fraser in the *Love v. County of Flagstaff SDAB* decision, we must ask whether the taking or encroachment is within the limited circumstances of a legitimate public good that would properly justify a taking or encroachment. The establishment of that legitimacy is a precursor –a necessary preliminary step – if an encroachment on private property rights can be said to properly respect those rights. Failing to first establish the legitimacy of the public need through a transparent, impartial assessment process, risks leaving an impression of disrespect for private property rights, no matter how "fair" the amount of compensation may be.

The second element of fair process consists of the mechanics of process - things like whether sufficient notice of a proposed taking has been given to the land owner, was there a reasonable opportunity for the land owner to respond, is there a right to a hearing, is there a right to an appeal?

The last element under fair process is fair compensation. I often think of a conversation I had with a farmer from Foremost over a year ago. He said that most farmers in his area understood that some things were necessary for the good of the Province as a whole. However, when compensation is not current and fair, then land owners are made to feel that they , as a class, are being forced to subsidize whatever public good is trying to encroach on their land, rather than having the true cost passed on and shared by the ultimate consumers of that public good.

In essence, land owners do not want to feel like they are being made to sacrifice fair process, in all its component parts, for the sake of general expediency or industry convenience.

Contextual Issues

In the course of my discussions with land owners over the past year, and in articulating many of their concerns, I have come to believe that to adequately address those concerns, we need to

first incorporate into the discussion a couple of larger, contextual questions. Those two questions are philosophical and cultural in nature.

The cultural question has to do with the changing way of life in rural Alberta. Partly from evolving demographic and economic realities, and partly from government policy shifts, there has arisen a growing loss of local control over local institutions. This reality is observed in such things as the abolition of local health boards, in school board consolidation and in centralized ambulance and 911 services. The cumulative effect is that accountability and control over what have been seen as local issues and local services are shifting to a central authority.

These trends are experienced in urban Alberta as well. But, given the demographic, cultural and local government experience of rural Albertans, those trends may be more acutely felt in rural areas.

As a result, rural people sense that they are losing ever more control over their daily lives, and perhaps even their destiny. A land owner's diminishing right to say "no" in property rights issues presents immediate, specific, tangible problems for that land owner. But, it also becomes something of a tipping point – just one more example of losing control over a cherished way of life.

The philosophical question has to do with our expectations of government – what kind of government do we want. To put it in terms of a crude dichotomy, do we want small government or big government, local government or central government, limited government or an intrusive, paternalistic government?

Many specific issues in the property rights debate are manifestations of this larger philosophical question, and the *Alberta Land Stewardship Act* (ALSA) serves as an object lesson in this relationship between the philosophy of government and property rights concerns.

The *Alberta Land Stewardship Act* established a framework for a series of seven regional plans, of which one (Lower Athabasca Regional Plan) has been established, and one (South Saskatchewan Regional Plan) is in the finishing stages.

Based on what I have been hearing through stakeholder conversations, I have come to believe that the objections to ALSA are not rooted, primarily, in the concept of regional land use controls themselves. Certainly, one rationale for the Land Use Framework (LUF) and ALSA is that the land use controls and potential restrictions in ALSA are really no different in concept from what municipal governments have exercised for over 100 years.

That point is true, but the distinction for many people is that under ALSA, the responsibility and authority for making and enforcing those restrictions are moving away from those locally-

accountable municipal governments, to the Provincial Cabinet, which in turn is perceived as centralized, remote and perhaps unresponsive.

So when people look at how ALSA implements the goals of LUF, when they see things like Cabinet authority over the plans, the power of the Provincial Government to impose enforcement on municipalities, and of the diminishing and even non-existent right of municipal governments to say "no", they see signposts of central planning, and a trend of government being less local, less responsible and less accountable. In this sense, the discussion is about the right to self-government through locally elected councils as much as it is about property rights *per se*.

And, while "consultation" in the process may be used to justify and give validity to the authority that is being assumed by Cabinet, that consultation is thin compensation for stakeholders if they see the process as agenda-driven and the outcome as pre-ordained.

Consequently, regardless of one's position with respect to LUF and ALSA - even if one supports them – it must be acknowledged that some of the tools in ALSA might be seen as indicators of centralized planning or the tipping point of a cultural trend. That reality brings to the discussion a visceral sensitivity to property rights, rooted in philosophical principles and cultural experience.

In raising these cultural and philosophical questions, I do not mean to diminish or gloss over the importance of the specific problems to individual land owners. To the contrary, I believe that to adequately address those specific problems in the long term, we also must engage and respect the cultural and philosophical values that give significance to land ownership in Alberta.

RECOMMENDATIONS

Under section 5(1) of the *Property Rights Advocate Act*, the Advocate is empowered to set out in Annual Reports any recommendations relating to property rights that the Advocate considers appropriate.

The recommendations offered in this Report are based on actual concerns I have received in numerous discussions with various land owners throughout Alberta. While they are not meant to be a collective panacea for all the ailments to be found in the property rights debate, they are intended to be simple and clear proposals that can provide discernable improvement or stability for the rights of the average property owner in Alberta.

Possible Privatization of the Land Titles Registry

It was apparent through the course of the past year that the Government had been giving preliminary contemplation to the possibility of privatizing the provincial Land Titles Office registry. While very recent events suggest that a full privatization model may no longer be a consideration, the concurrent political uncertainty also suggests that the issue may be less than settled. Accordingly, as long as privatization remains a possibility for the Land Titles Office, it seems prudent to maintain my planned recommendation that relates to this issue.

There are a number of considerations in the privatization debate. However, I will focus only on how privatization may affect the property rights of individual Albertans. I will not address the question, for example, of whether or not there are defensible financial reasons for such a policy decision.

I have every sympathy with looking for efficiencies within government operations, and for limiting the size of government to its proper functions. However, in such discussions, there is a distinction to be made between limited government and small government.

The concept of limited government acknowledges that some public services and functions are best fulfilled by government. Sometimes, if a policy focus is simply on making government smaller, we might remove a legitimate function that is permissible, and even necessary, as a limited government purpose. In so doing, there may arise unintended consequences that go beyond the base consideration of cost saving. In this context, I believe that a government-owned and operated real property registry is a necessary component of a legitimate government purpose.

Indefeasibility of Title is a fundamental purpose of the Torrens registry system (upon which our Land Titles registry is based). The phrase "indefeasibility" literally means, "that which cannot be defeated, revoked or made void". It refers to the concept that the registry system is sufficiently secure, accurate and reliable so that (with very few exceptions) a Certificate of Title from the Land Titles Office is recognized as conclusive proof of an owner's interest in the land. In essence, the concept gives primacy to registered interests in land over unregistered interests (again, with very few exceptions). As a result, one does not have to prove a chain in historical Titles to establish the validity of one's interest in land. The government guarantees the inviolability of the Certificate of Title as a record of (registered) interest in the land.

Government provision of the land registry service provides a significant measure of confidence in and practical support of, that concept of indefeasibility – there is a certain objective security and quality assurance in government operation of the registry. Indeed, the existing system has a lengthy, proven track record, and there is a high level of trust on the part of Alberta's land owners. The broad public confidence in the existing land registry system evidences a solid point of trust in government that should not be discarded too lightly.

Indefeasibility of Title and the inherent confidence in the registry are essential reinforcements for property rights – they help prove ownership and provide security of the value in the property that is evidenced by the registry. To diminish confidence in the registry would reduce the security of both legal ownership and the investment value for individual land owners.

Even if an economic, cost-saving argument might be made in favor of privatization, I would argue that any financial benefit that is foregone by not privatising is simply the price that must be paid for maintaining a high level of trust and integrity in the land conveyancing system.

Recommendation 2013.01 – that the Government retain the direct and full ownership and operation of the land registry system under its existing format in the Land Titles Office.

Surface Rights Act Review and Expropriation Act Review

A recurring and persistent series of concerns has been expressed over the past year with respect to various applications of the *Surface Rights Act*. The concerns reported to our Office include the following claims:

- that applications for a Right of Entry Order have been made to the Surface Rights Board before good faith negotiations have been completed;
- that regard for the federal *Bankruptcy and Insolvency Act* unduly interferes with orders for payment to land owners under section 36 of the *Surface Rights Act*, in cases when

the operator has filed for bankruptcy; the Surface Rights Board finds itself unable to remedy the situation without statutory revisions;

- there seems to be little accountability on resource companies if they fail to follow the rules (for example, something as basic as the timely delivery of a signed contract to the land owner);
- there is no timely and cost effective mechanism for land owners to enforce contractual rights (for example, the obligation of a resource company to effect weed control on a right of way);
- compensation calculations, including land owner reimbursement for representation costs, can be unpredictable and not always reflective of a land owners full loss;
- the entry fee rate is outdated, and does not reflect current market values for land.

As for the *Expropriation Act*, a particular concern relates to situations where the expropriating authority is the same entity as the approving authority (such as exists when a municipal government expropriates land). The practical result is that if a land owner objects to the expropriation in this scenario, and a hearing report is issued that finds against the expropriation by the municipality, there is no mechanism to compel the municipality to follow the hearing report. Because the municipality also is the approving authority, it can ignore an unfavorable report and still proceed with the expropriation. This creates a perceived conflict of interest, and a procedural unfairness, that would seem to taint the legitimacy of the expropriation process.

Given the complexity of the processes under these two Acts, most of the related concerns can be addressed only through a comprehensive public review of the two pieces of legislation. Unfortunately, at the time of writing this Annual Report, that review does not seem to be forthcoming.

From the time of my appointment as Property Rights Advocate in December 2012, I have heard about the promise of a review of both the *Surface Rights Act* and the *Expropriation Act*. However, the time frame for establishing parameters and proceeding with a review has been consistently and repeatedly extended. The importance of outstanding problems under these two regimes would seem to require a more deliberate and timely approach to conducting the reviews.

Recommendation 2013.02 – that the Government direct the prompt commencement of a full public review of *the Surface Rights Act* and the *Expropriation Act*.

It should be noted that there is one problem in the *Surface Rights Act* regime that can be remedied with a measure of expediency and simplicity, and does not need to await a comprehensive review of the legislation to be given effect.

Section 19(2) of the *Surface Rights Act* establishes the amount of entry fee to be the lesser of either $5,000 or $500 per acre of land granted to the operator. However, these amounts were determined at a time when land prices were perhaps one third to one half of what they are today. Accordingly, the amount set for entry fees in the Act has not kept pace with current market values of land, and does not seem to reflect fair compensation in the current economic climate.

The remedy is not simply to increase the amount of the entry fee, but also to establish a mechanism for setting the amount of those fees that is more sensitive and responsive to market trends.

Recommendation 2013.03 – that the Legislature amend section 19(2) of the *Surface Rights Act* to allow the amount of entry fees to be set by regulation, and further, that the initial rate for calculation of entry fees be set at no less than $1,200.00 per acre.

Municipal Government and the Scope of Expropriation Powers

Earlier in 2013, we received a series of contacts from a land owner who was facing an expropriation by his Town government. The land in question was zoned as commercial property, and the land owner was developing it over time, subdividing it and selling parcels, in a manner and at a pace that made the most business sense to him.

The Town Council commenced expropriation proceedings, not to advance a traditional public works project, but rather so that the Town could develop the land and sell lots itself, instead of leaving it to the land owner. The land owner believed that the Town was unsatisfied with his pace of development.

I do not want to address in this report the philosophical question of whether for-profit land development is an appropriate function for municipal (or any) government. However, it is a fair question to ask whether a coercive taking power should be used instead of free and fair negotiations, if that municipal government does choose to involve itself in the land market.

The power of expropriation gives government a power that no other buyer could have over a willing seller in a free market. Aside from the inherent unfairness of a power imbalance over potential sellers, the forced entry into the land market through the power of expropriation can lead to significant market distortions.

The most obvious distortion is the appropriation by the municipality of the rightful land owner's profit potential in that land. Compensation paid to a land owner under an expropriation would

not account for potential profits that a land owner might expect in the future, if he or she was allowed to develop and sell the land freely, in a manner and at a pace that the land owner decided would maximize profit over time.

Another distortion could arise as an unintended consequence, namely the effect on neighbouring land prices in general. Placing a block of expropriated land on the market, where its cost base may be artificially low, and where it could create an oversupply of land, would lead to depressed, or at least less than optimum, market values. That, in turn, affects neighbouring land owners, and the market values they could expect for their land.

But, beyond the possible market distortions, the purpose of the expropriation in this case – resale of the land by the municipality - seems to fall outside of the principles for government appropriation of private land, as contemplated by Chief Justice Fraser in the *Love v. County of Flagstaff SDAB* decision. Ultimately, it fails the test of legitimate public purpose as a part of fair process.

The concept of a public good should not become so distorted as to include the diversion of cash flow and profit from private land owners to municipal coffers. Accordingly, the authority to expropriate private land merely for resale by a municipality should be removed from the *Municipal Government Act*.

Recommendation 2013.04 - that the Legislature amend the *Municipal Government Act* to delete section 14(2)(d), and remove from the municipal powers of expropriation the purpose of selling land as building sites.

Forced Entry of Homes in the Town of High River

It has become conventional fact that the widespread flooding in June of 2013 was the worst natural disaster in Alberta's recorded history. The extent of devastation to human life, to families, to property and to the affected communities in general cannot be over-stated.

The Town of High River was particularly hard-hit by the flooding. Its residents suffered significant damage to large numbers of their homes, businesses and infrastructure.

This office received a number of calls from and on behalf of High River residents after the flood. In addition, I was able to meet in person with a few of the residents, who brought their concerns to my attention.

Some of the issues that were raised in these various discussions related to the calculation of compensation from the Provincial Government, and others related to the effect on land owners of re-zoning and other flood mitigation measures for land now deemed to be at risk. Still others were concerned about the previous state of flood-preparedness and the extent to which on-the-ground factors may have aggravated the extent of the damage suffered. For example, the community of Hampton Hills in Northeast High River was caught between the peculiarities of a road and bridge configuration to the North, and the erection of a large berm to the South. As a result, although it was not located on a known flood plain, rapidly rising floodwaters nonetheless flowed into this neighbourhood and remained there for an extended period of time.

The foregoing issues are significant, and certainly have a consequential effect on the residents' enjoyment of their property. Resolution may come only with the passage of time, through evolving policy discussion and implementation, through land owner negotiations, or in hopefully rare cases of litigation.

Unfortunately, in addition to the direct harm caused by the flooding, many High River residents also experienced an unwanted man-made intrusion into their flood-threatened and damaged homes. As the disaster unfolded, it became apparent that Members of the Royal Canadian Mounted Police were engaged in a systematic process of forcibly entering a large number of homes in High River. In the course of doing so, they removed quantities of personal property, largely consisting of legally registered firearms belonging to the respective home owners. It appears that by the time this course of action had ceased, over 1,900 homes in High River had been forcibly entered.

If the sampling of home owners that I spoke to is any indication, most of the forced entries were neither invited nor welcomed. It must be acknowledged that as a result, most affected residents were left feeling that their property rights had been violated in the midst of their flood-ravaged vulnerability. This is not an unnatural consequence, for inherent in any sense of meaningful property rights is the expectation of peaceable and exclusive possession.

It should be noted that this Office is not mandated to delve into matters of police oversight. It also is not my intention to question or second guess emergency responders who faced a serious, pressing disaster. However, it is a legitimate sphere of concern for this Office to review the extent to which provincial authority was relied upon as the legal basis for the forced entries. In that review, we can evaluate whether provincial law can be clarified, so as to better respect property rights if similar circumstances arise in the future.

It also should be noted that in making this review, the Property Rights Advocate Office is not endowed with the investigative or remedial powers to directly address these incidents. We are

able to make inquiries on a voluntary basis, and monitor information that is available to members of the public. In this regard, we are looking forward to the release of the results of the public interest investigation conducted by the Commission for Public Complaints against the RCMP.

In the meantime, I was able to inquire of the RCMP as to the extent that provincial authority was relied upon by their Members in effecting the forced entries. A response was written by then Deputy Commissioner D.N. McGowan, who indicated, among other things, the following:

- they looked to section 19 of the *Emergency Management Act*, for authority under the state of emergency;
- they took possession of improperly stored firearms in just over 100 occasions;
- at no time did they take operational direction from any elected officials or public service employees to enter private homes;
- after 21 June 2013, their focus turned from one of active rescue of persons in distress to efforts to locate stranded individuals;
- they believe that their actions were undertaken in good faith, in chaotic circumstances, with full and proper legal justification.

Regrettably, the experiences of High River home owners were somewhat broader than what may have been reflected in the reports given to Deputy Commissioner McGowan. Among the reports that the Property Rights Advocate Office received were the following items:

- some home owners reported forced entries through the front and back doors of the same residence;
- forced entries were made into some homes that were outside of the flooded areas
- at least two instances were reported where doors had been left unlocked, but still a window was smashed to gain entry;
- home owners reported indications of searches of their homes that were more extensive than one might expect from a "plain sight" appropriation of firearms. They observed evidence of closet doors and dresser drawers having been deliberately opened and the contents examined;
- buildings were left unsecured after the forced entry and search, leaving household contents vulnerable;
- in at least one case after a forced entry, a front door which had been knocked off its hinges was left on the lawn;
- sewage was found to have been tracked through residences by the people who conducted forced entries;

- forced entries of High River homes continued well after the imminent danger had passed. It appears that up to June 24, 2013, when the emergency was deemed to be over, approximately 674 homes had been forcibly entered. Yet, after that date, over 1,200 homes were forcibly entered, and presumably searched;
- no home owner was asked to accompany the forced entry teams, to provide consent or facilitate entry, even though residents were required to register with local authorities and provide contact information upon their evacuation;
- residents observed a lack of reports of similar widespread forced home entries in other areas of Alberta affected by the flooding, or even in other large scale disasters, such as the Slave Lake Fire in 2011.

The affected High River home owners recognized the demands placed on first responders in a disaster of this magnitude. But, they also believe that the forced entries into their homes were carried out under tenuous legal authority, and occurred long past the reasonable requirements of a state of emergency. Rather than having their home ownership respected, they were left feeling that their rights were sacrificed on the altar of a dubious expediency.

As previously noted, Deputy Commissioner McGowan advised that the RCMP Members involved in this situation did not take operational direction from elected officials or public service employees. Instead, they relied on the authority of section 19 of the *Emergency Management Act*. But if such actions were taken by the RCMP Members under section 19 without Ministerial approval or direction, as normally would be required by the *Act*, their interpretation of that section is misguided. This suggests a need to clarify the legislation.

Actions, behaviors and attitudes cannot always be legislated with precision, especially when discretion needs to be exercised in an emergency situation. But, a state of emergency should not be used as an excuse to encroach on the property rights of land owners, if that encroachment is based more on expediency than it is an actual imminent threat. Perhaps an amendment to section 19 of the *Act* can serve as a clear statutory direction that emergency powers and discretion are not unfettered. It also can serve as a reminder of the need for a measure of goodwill from those charged with following the *Act's* provisions.

Recommendations 2013.05 - that the Legislature amend the *Emergency Management Act* to clarify and affirm the consistent respect for and deference to private property rights, even in the face of an emergency situation. Specifically, it is recommended that section 19 of the *Act* be amended to confirm that a natural disaster does not create licence to disregard the property rights of individual Albertans, nor does it absolve the authorities from a responsibility to follow the due process of law (including the need to obtain Ministerial authorization) if any encroachments do become necessary as an emergency response.

While there are many ways to articulate this clarification, the following draft is offered as a starting point for legislative review:

The opening clause of section 19(1) of the *Emergency Management Act* could be re-worded as follows:

> 19(1) On the making of the declaration and for the duration of the state of emergency, the Minister may do all acts and take all necessary proceedings, provided that they are consistent with what reasonably may be required in the face of a clear, significant and pressing threat or danger to human life or safety, or with what demonstrably is required to preserve or secure property, both real and personal, in the face of such threat or danger, which actions may include the following:

And then, as one of the enumerated powers of the responsible Minister in an emergency, as listed later within section 19, sub-section 19(1)(h) of the Act could be re-worded as follows:

> 19(1)(h) authorize the entry into any building or on any land, without warrant, by any person in the course of implementing an articulated emergency plan or program, provided that such entry is demonstrably necessary and proportionate in scope to the demonstrated need;

* * * * * * * * * * * * * * * * *

The foregoing Annual Report of the Property Rights Advocate Office for the year 2013 respectfully is submitted this 02 day of June 2014.

N. Lee Cutforth, Q.C.
Alberta Property Rights Advocate

ISBN 978-1-4601-1771-2 (Print)
ISBN 978-1-4601-1772-9 (PDF)
ISBN 978-1-4601-1773-6 (HTML)